IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

W. THOMAS BAYHA and SUSAN BAYHA,	)	**No. 26461-1-III**
Appellants,	)	
v.	)	
WILLIAM and CAROL LAMPSON, husband and wife; DIEHL R. and JANE DOE RETTIG, husband and wife,	)	
Respondents and Cross-Appellants,	)	
GENE and VICTORIA SILVERNAIL, husband and wife; DONALD and NORMA SHORT, husband and wife; DANIEL and JANE DOE BARIAULT, husband and wife; BELHAVEN GROUP, a Washington corporation; BELHAVEN APPLIED TECHNOLOGIES, a Washington corporation;	)	**Division Three**
Defendants,	)	
COLUMBIA TRUST BANK; and MARTY and JANE DOE OTTEM, husband and wife,	)	

Respondents.) UNPUBLISHED OPINION

Korsmo, J. — The trial court granted summary judgment dismissal on numerous claims raised by Thomas Bayha against his former business partners and creditors. After review of the file, we agree that the evidence was not sufficient to proceed to trial. Two of the respondents cross appeal the trial court's refusal to impose sanctions for frivolous litigation. We find no abuse of the trial court's discretion. Accordingly, we affirm all of the trial court's orders.

FACTS

Bayha served as president of Belhaven Applied Technologies (BAT) and was one of four who owned equal stock in the Belhaven Group (BG), which in turn owned BAT. BG was formed in 1993; BAT was formed in 1997. Bayha also served as president of BG. One of the other shareholders, Gene Silvernail, worked as technical director for BAT.[1] Bayha and Silvernail managed the day-to-day business of BAT.

Silvernail experienced personal financial difficulties in 1997 and received a personal loan from William Lampson. Silvernail pledged 25,000 shares of BG stock as collateral. Additional loans were made in 1999 and 2000. Silvernail pledged a total of 40,000 shares of BAT stock as collateral for those loans. Lampson told Silvernail that the

[1] The other shareholders, Daniel Bariault and Donald Short, are not parties to this appeal.

stock would be returned upon repayment of the loans. He permitted Silvernail to continue voting the stock as the shareholder of record.

Bayha co-signed a commercial guaranty for loans made to BAT from Columbia Trust Bank (Bank) on November 29, 2000. The guaranty required Bayha to repay any existing and future indebtedness of BAT to the Bank. Silvernail also signed the guaranty, which permitted the Bank to proceed against any co-signer individually. Bayha and Silvernail both signed a promissory note guaranteeing the Bank's loan. The note also allowed the Bank to proceed against an individual guarantor. The Bank loaned a total of $200,000 to BAT and also granted a $50,000 operating line of credit. In addition to the Bank, BAT received money from Bayframe, Ltd., a business owned by Bayha and his family.

By 2002 the personal relationship between Bayha and Silvernail had soured. While Silvernail was in Denmark on company business, Bayha investigated suspicious expenditures of BAT funds. He was assisted by employees Kathy Brown and Meredith Bretz. Bayha concluded that Silvernail had embezzled $30,000 from BAT. He asked the Kennewick Police Department to investigate the matter.[2] Bayha retained attorney George Fearing to represent him and the corporations.

[2] The police department later sought additional information from Mr. Bayha, including an independent audit. That information was not provided because Mr. Bayha believed it would cost too much. No criminal charges were ever filed.

Bayha filed a civil suit in Benton County on December 4, 2002, to recover the allegedly embezzled funds. *Ex parte* orders were entered prohibiting Silvernail from going onto the company premises, using its property, or writing checks on the company account. When Silvernail returned from Denmark, Bayha promptly fired him. The other members of the BAT and BG boards were not consulted before these actions were taken.

Silvernail retained attorney Diehl Rettig to represent him. Rettig wrote Fearing, threatening to countersue Bayha and also remove him from office at the upcoming shareholder meeting. Fearing advised Rettig that his client would not pursue discovery because Silvernail filed for bankruptcy. On December 16, Fearing withdrew from the suit. He discovered a conflict of interest after noting a deposition of a bank employee. Fearing's firm represented Columbia Trust Bank.

The other BG and BAT shareholders filed suit against Bayha on December 23, seeking, *inter alia*, to compel Bayha to hold the annual shareholders meeting. The following day, the court entered a show cause order requiring Bayha to appear on December 30. Rettig personally served the order at Mr. Bayha's home later in the day on Christmas Eve. Mr. Bayha later stipulated to holding the meeting.

The BG shareholders meeting was held January 3, 2003. Bayha presented his evidence against Silvernail and Silvernail responded to the allegations. The other

shareholders voted 3-1 to remove Bayha as president. Lampson was then appointed President. The board of directors reappointed themselves and also made Lampson chairman of the board. The BAT directors then met and removed Bayha as president. They also selected Lampson to replace him. Silvernail was returned to his former management position.

Two months later Mr. Bayha, represented by Mr. Fearing, filed suit in the United States District Court for the Eastern District of Washington. The suit named BAT, BG, and the four other directors, alleging violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act, as well as state law violations relating to the termination of Bayha from BAT and BG. The defendants, represented by Rettig, counter-sued.

A settlement conference was held in the federal case six months later. The defendants told Bayha that continuation of the suit would bankrupt the companies and make Bayha liable on the note to the bank. When Bayha asked the others what they wanted from him, Rettig replied that Bayha could "slit his throat and bleed all over the floor." Clerk's Papers (CP) 425, 429. Later during the conference, Rettig told Bayha that "we will take you out." CP 94, 425, 429. Bayha subsequently filed a complaint with the Washington State Bar Association, claiming that Rettig had physically threatened him with death. No criminal charges were ever sought.

The Bank sent notices in September 2003, that BAT's loans were past due. Mr. Bayha responded and asked to be relieved of responsibility since Mr. Lampson was operating the company and that the Bank was required, by its own by-laws, to seek a guarantee from Lampson because he was actually a covert major shareholder. The Bank replied that Lampson personally was guaranteeing new loans to BAT but was not responsible for the older loans, which had now been brought up to date.

The federal court dismissed the RICO claims by summary judgment in September 2004, and then dismissed the state law claims without prejudice. BAT filed for bankruptcy after the litigation and BG closed its doors. The Bank sent a letter on November 22, 2004, noting BAT's default and requesting that Bayha honor the guaranty.

Bayha filed the current lawsuit on November 30, 2004, against Lampson, Silvernail, Rettig, Short, Bariault, BG, BAT, Columbia Trust Bank, and the Bank's president and CEO, Marty Ottem. The suit alleged a number of causes of action against individuals and combinations of the various defendants. The allegations relevant to this appeal will be detailed in the analysis section. The Bank counterclaimed for enforcement of Bayha's loan guaranty.

One year later, Lampson, Rettig, the Bank, and Ottem all filed motions for summary judgment. Bayha sought to continue the hearing, but also responded to the

motions by alleging that factual questions existed that precluded summary judgment. The trial court denied the motion for a continuance and ultimately granted the motions for summary judgment.

Lampson and Rettig sought attorney fees and costs for frivolous litigation under both CR 11 and RCW 4.84.185. The court declined to award attorney fees and denied the motions, although the court thought the issue was "about as close as any that I have ever heard." Report of Proceedings (Mar. 27, 2006) at 28. The Bank moved for summary judgment on its counterclaim, seeking the remaining balance of $165,486.54 that had not been previously paid. Bayha admitted the guaranty was enforceable, but raised affirmative defenses under the Uniform Commercial Code (UCC). The trial court found that the affirmative defenses were waived by the failure to plead them in a timely manner. The Bank's motion for summary judgment on the counterclaim was granted.

The trial court ruled that there was no just reason to delay an appeal. Bayha appealed the summary judgment order and this court concluded that the appeal was proper even though not all parties had taken part in the summary judgment. Rettig and Lampson both cross-appealed from the denial of attorney fees.

ANALYSIS

This court reviews a summary judgment ruling *de novo*, performing the same

inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id*. If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id*.

The moving party bears the initial burden of establishing that it is entitled to judgment because there are no disputed issues of material fact. *Young v. Key Pharm.*, *Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish there is a genuine issue for the trier of fact. *Id.* at 225-226. The plaintiff may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.*

The numerous claims against the various respondents in this appeal overlap to a degree, but for the sake of clarity we will address the claims by defendant.

Rettig.

Bayha raises two claims against Rettig, including an allegation that he was part of a civil conspiracy against Bayha. A civil conspiracy exists when it is shown by clear,

cogent, and convincing evidence that two or more people (1) combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose through unlawful means, and (2) the conspirators entered into an agreement to accomplish the conspiracy. *Wilson v. State*, 84 Wn. App. 332, 350-351, 929 P.2d 448 (1996), *review denied*, 131 Wn.2d 1022, *cert. denied*, 522 U.S. 949 (1997). An attorney enjoys immunity for actions taken on behalf of clients during judicial proceedings as long as the attorney's statements are material to the redress or relief sought. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); *Kearney v. Kearney*, 95 Wn. App. 405, 415, 974 P.2d 872, *review denied*, 138 Wn.2d 1022 (1999).

Bayha alleges that numerous actions by Rettig demonstrated his involvement in a conspiracy. The first of those is a contention that Rettig intimidated or tampered with a witness, Bayha, to prevent prosecution of Silvernail. This allegation fails on several levels, including lack of evidence that Rettig's alleged actions were done as the product of an agreement with others. There was no witness tampering because no charges were ever filed against Silvernail. Bayha could not thus be a "witness" for purposes of the tampering statute, which requires that an official proceeding or criminal investigation be underway. RCW 9A.72.120(1). Before Rettig got involved in these matters, Bayha had already stopped assisting the investigation when he declined to provide further

documentation. Thus, there was no "investigation" and, for that reason also, tampering was not established.

The witness intimidation statute does not require that charges actually be filed before a person could become a "witness." However, the statute requires proof that a person used a "threat" against a prospective witness in order to influence testimony or induce the witness to evade proceedings or not take part in an investigation. RCW 9A.72.110(1). There simply is no such evidence here. Mr. Bayha had stopped assisting authorities on his own, and there is no allegation that he was threatened in order to get him to change his testimony or avoid taking part in proceedings.

The allegations that Rettig tampered with or intimidated a witness are without foundation. They do not support the civil conspiracy claim.

Bayha also alleged that Rettig's service of a show cause order on Christmas Eve evidenced participation in a conspiracy. This is baseless. There is no evidence, nor any argument, that it is illegal to serve legal papers on Christmas Eve. This action does not constitute an "unlawful means" to support a civil conspiracy. *Wilson*, 84 Wn. App. at 351.

Bayha next argues that Rettig assaulted him during the RICO settlement conference and that the assault was both evidence of conspiracy as well as an

independent basis for tort liability. However, there was no assault.

An assault is the use or threatened immediate use of force that causes reasonable apprehension of harm. *Brower v. Ackerley*, 88 Wn. App. 87, 92, 943 P.2d 1141 (1997), *review denied*, 134 Wn.2d 1021 (1998). In *Brower*, the court concluded that telephone calls that threatened "I'm going to kick your ass" and "you're finished; cut you in your sleep" did not constitute assault. *Id.* at 94. There was no threat of *immediate* harm. *Id.* at 94-95. Similarly here, there was no threat of immediate harm. The "slit throat" comment was just a crude suggestion about what Mr. Bayha could do to himself; Rettig did not threaten to take such an action. The comment "we will take you out" in context appeared to refer to the counterclaim being asserted in the RICO action. Nonetheless, the statement was not an indication that immediate action would take place.

Mr. Bayha properly handled the matter by referring it to the Washington State Bar Association. Allegations of an attorney's rude, threatening, or boorish conduct should be handled by that organization. The allegation here simply does not prove assault. Tellingly, Mr. Bayha's contemporaneous conduct also suggested that there was no assault. He did not act to protect himself, leave the room, or immediately call the police. This evidence does not prove the tort of assault took place. It also does not suggest that a civil conspiracy was occurring.

Bayha claims that Rettig filed false affidavits and lawsuits that were based on lies. His scant argument proves nothing. If the allegations were true, Mr. Bayha could easily have had the actions stricken and sanctions imposed through CR 11. Regardless, these filings are not actionable here due to Mr. Rettig's immunity. *McNeal*, 95 Wn.2d at 267.

Mr. Bayha also argues that Rettig was involved in the decision to terminate him from BAT as well as the company's subsequent failure and bankruptcy. Allegedly these actions showed a civil conspiracy. However, the evidence reflects only that Mr. Rettig worked as an attorney for the other shareholders, and later for the company. He did not exercise managerial authority. Whatever actions he may have taken to assist in the company's affairs was as an attorney. The behavior was privileged and immune from suit. *Id.*

Mr. Bayha also complains that Mr. Rettig prevented Ed Bayha, Thomas Bayha's brother, from receiving unemployment benefits. He presents no evidence whatsoever that Rettig was involved in that action. The claim is utterly frivolous. If there was involvement by Rettig, it also would appear to be in the course of his role as an attorney and, therefore, subject to immunity.

Last, Mr. Bayha argues that Rettig, as an owner and director of Columbia Trust Bank, conspired against him. Rettig acknowledges that he did not act as an employee or

attorney for the Bank. He denies being involved in banking operations, including such decisions as whether or not to seek security on loans. As with the previous claim, the record is totally lacking facts to support the claim. There simply is no evidence that Rettig was involved in banking decisions affecting Bayha, BAT or BG.

The trial court correctly concluded that the evidence did not support the allegations that Rettig had assaulted Bayha or was involved in a civil conspiracy against him. There was no basis for finding Rettig liable. Summary judgment was proper.

Lampson.

Mr. Bayha alleged two or three causes of action against Mr. Lampson. The first claim is a contention that Lampson terminated Bayha's employment in violation of public policy. It is questionable whether this tort applies to a corporate president removed from office by the board of directors. We need not decide that question because the record simply does not show that Mr. Lampson was involved in terminating Bayha's employment.

The other three shareholders were the ones who removed Bayha from office and terminated his employment. Lampson then replaced him. Lampson could not have been involved in improperly terminating Bayha's employment because he had no ability to do so. The fact that he ultimately replaced Bayha in the office does not mean that he was able to terminate Bayha's employment. There simply could be no liability for unlawful termination under the facts of this case. Summary judgment on this theory was proper.

Bayha also argues that Lampson was involved in a civil conspiracy against him. The standards for proof of civil conspiracy have been noted earlier. The specific actions that allegedly showed Lampson's involvement in a conspiracy include the contested unemployment compensation claim of Ed Bayha; Lampson did not guarantee the Bank loan to BAT in place of Silvernail; Lampson increased Bayha's liability to the Bank; and

that Lampson allegedly ran BAT into the ground. There was no evidence to support these allegations.

There simply is no evidence in the record that Lampson was involved in Ed Bayha's unemployment compensation claim. Moreover, even if Lampson had been involved, there is nothing unlawful or improper in an employer challenging an unemployment claim.

There also is no basis for finding conspiracy in Lampson's not guaranteeing the loans that Bayha also guaranteed. Bayha's argument seems to assume that Lampson was the owner of Silvernail's stock and therefore obligated to co-sign with the Bank. However, there is no evidence that Lampson ever owned Silvernail's stock. Rather, the sole evidence is that he held the stock as a pledge for the loans he made to Silvernail, who continued to vote the stock. Bayha also co-signed the loan two years before Lampson became involved in the affairs of BAT.

There was no obligation for Lampson to guarantee past debts of BAT. His failure to guaranty a previously issued loan does not present evidence of a civil conspiracy. This argument fails to advance the conspiracy claim.

Bayha next argues that Lampson mismanaged BAT and squandered its assets. The record suggests otherwise. A 2003 report from a certified public accounting firm showed

that BAT was insolvent as of December 31, 2002, while Bayha was still president and before Lampson became an officer and director. It also is clear that the company incurred significant litigation expenses responding to Bayha's lawsuits. There factually is no evidence that Lampson mismanaged the company.

A corporate officer cannot be held liable for taking good faith actions reasonably believed to be in the corporation's best interests. RCW 23B.08.420(1), (4). To prevail on the mismanagement claim, Bayha would have to show that Lampson did not act in good faith and did not act in the best interests of the corporation. He has provided no such evidence. The fact that a company has failed does not mean it did so because of the bad faith actions of corporate officers. Bayha has established nothing other than the fact that BAT ultimately failed. He has not shown mismanagement.

Bayha also claims that Lampson increased Bayha's liability to the Bank. There is no citation to the record to suggest the basis for this claim. The fact that Lampson was also a director of the Bank simply does not show that Lampson did anything to increase Bayha's liability. His liability was fixed when he co-signed the note in support of BAT. Whether or not someone else had co-signed would perhaps have aided the Bank by giving it more repayment options, but it would not have decreased Bayha's potential liability.

The trial court properly granted summary judgment on this issue. There was no

evidence supporting the claim of civil conspiracy.

In his reply to the motion for summary judgment, Mr. Bayha also alleged that Mr. Lampson had breached his fiduciary duties to Bayha as a BAT stockholder. The alleged bases for this claim are the same as those just discussed under the civil conspiracy claim relating to the ultimate failure of BAT and the fact that Lampson did not guarantee the loan that Bayha had already guaranteed. To the extent this is a third theory of liability, it fails for the same reasons that these claims did not support a civil conspiracy claim. The facts do not support liability.

There was no evidence supporting the claim of civil conspiracy. Mr. Lampson was not involved in discharging Mr. Bayha from his position. There was no breach of fiduciary duty. There was no basis for proceeding forward to trial against Mr. Lampson. The trial court properly granted summary judgment.

Bank and Ottem.

Mr. Bayha argues that the Bank and its president, Mr. Ottem, breached their duty to deal in good faith with him by (1) not requiring Lampson to guarantee the loan to BAT and (2) not accounting for the bankruptcy liquidation of BAT's assets. Bayha also claims the Bank was involved in the civil conspiracy against him. As with the previous claims, there is no factual or legal basis for imposing liability.

The essence of Bayha's first argument is that Lampson was actually the owner of Silvernail's shares but was not required to co-sign the loan with Bayha. This argument fails factually for the reasons previously noted—the evidence showed that Lampson only held the stock, but did not own it. Silvernail continued as the listed shareholder and voted the stock. Lampson exhibited no indicia of ownership. This claim is without factual merit.

Contracts carry an implied covenant of good faith and fair dealing that require the parties to work together to complete the obligations of the contract. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This obligation does not impose new terms into the agreement or require a party to change the agreement. *Id.* There is no "free-floating duty of good faith unattached to the underlying legal document." *Id.* at 570. The guaranty Mr. Bayha signed allowed the bank to unconditionally seek repayment from any guarantor. The presence of other guarantors would not have changed Mr. Bayha's liability to the bank. If he had desired other co-signers, such as Bariault and Short, he presumably could have refused to sign the loan unless they joined in. He did not do so. The Bank was satisfied with the signatures of Bayha and Silvernail, and apparently so was Mr. Bayha. His argument that the Bank dealt in bad faith concerning the note is without merit. There is no showing that the Bank failed to live up

to its obligations under the loan contract.

The other aspect of the good faith claim against the Bank is an argument that the Bank did not account for the assets of BAT before it moved against Mr. Bayha on the note. There was no requirement that the Bank do so. The note itself waived the requirement that the Bank exhaust BAT collateral before proceeding on the guaranty. CP 725. This argument, too, is without merit.

The civil conspiracy claim totally lacks factual support. Bayha can point to no evidence showing that the Bank did anything wrong. He needed to show that the Bank either was trying to accomplish an unlawful purpose or using an unlawful means to accomplish a lawful purpose. *Wilson*, 84 Wn. App. at 351. The trial court correctly granted summary judgment on this theory.

As with the previous defendants, the trial court correctly determined that there were no triable issues. Bayha's claims against Rettig, Lampson, and the Bank were without merit. Summary judgment on behalf of all those defendants was proper.

The Bank's Counterclaim.

The trial court granted the Bank's motion for summary judgment against Bayha on the note after striking Bayha's affirmative defenses. Bayha contends that the trial court erred because the defenses could not be asserted until the Bank sought a deficiency

judgment in its summary judgment motion. Bayha did not challenge the trial court's ruling in his opening brief of appellant. We conclude the current challenge comes too late.

The Bank sold the assets of BAT in the bankruptcy proceeding and applied them to the loan. When the Bank sought the remaining deficiency from Bayha, he argued that the Bank had not given him required notice under the UCC and had not conducted the collection in a commercially reasonable manner. RCW 62A.9A-610, -611, -612, -613. This argument was raised in response to the Bank's summary judgment motion.

RCW 62A.9A-626(a) governs deficiencies or surpluses from the sale of secured assets. Subsection (1) provides:

A secured party need not prove compliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue.

A comment to that provision provides:

Under paragraph (1), the secured party need not prove compliance with the relevant provisions of this Part as part of its prima facie case. If, however, the debtor or a secondary obligor raises the issue (*in accordance with the forum's rules of pleading and practice*), then the secured party bears the burden of proving that the collection, enforcement, disposition, or acceptance complied.

RCW 62A.9A-626 cmt. 3 (emphasis added).

CR 8(c) provides in part: "In pleading to a preceding pleading, a party shall set

forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." An affirmative defense is waived unless it is pleaded, asserted by motion, or tried with the consent of the parties. *Bernsen v. Big Bend Elec. Coop.*, *Inc.*, 68 Wn. App. 427, 433-434, 842 P.2d 1047 (1993).

Bayha complains in his reply brief that there was no basis to assert the affirmative defenses until summary judgment was sought because the asset sale had not taken place when the pleadings were filed. We question that argument in light of the fact that a year passed between the asset sale and the Bank's motion for summary judgment. It is clear that in Washington an affirmative defense must be pleaded and Bayha never sought to amend his answer to include these affirmative defenses.

Nonetheless, we do not have to resolve that question because Mr. Bayha never assigned error to the trial court's action striking the affirmative defenses and did not argue that point in the brief of appellant. Instead, he argued there that the court erred in entering judgment for the Bank without an affirmative showing that it had complied with the UCC. *See* Br. of Appellant at 29-32. It was not until the reply brief that Bayha challenged the trial court's ruling. *See* Appellants' Reply Br. at 21-23.

That argument was not raised in time. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy*

v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The trial court's striking of the affirmative defenses because they were untimely raised was the basis for granting summary judgment. Bayha needed to challenge that ruling if he hoped to overturn the judgment in favor of the Bank. His failure to do so waives the argument.

The trial court did not err in granting summary judgment on the note.[3]

Attorney Fees.

Lampson and Rettig both challenge the trial court's decision to not award attorney fees for frivolous litigation under either RCW 4.84.185 or CR 11. They also ask for attorney fees under those standards in this appeal.

The first sentence of the statute provides:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

RCW 4.84.185.

A trial court has discretion under RCW 4.84.185 both to impose sanctions for frivolous litigation and to determine the amount of reasonable attorney fees. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986);

[3] The Bank also argues that the UCC defenses were waived by the terms of the note. CP 724-726. We do not address that argument.

Zink v. City of Mesa, 137 Wn. App. 271, 277, 152 P.3d 1044 (2007), *review denied*, 162 Wn.2d 1014 (2008). A trial judge likewise has discretion under CR 11 both to impose sanctions and the amount of any sanction that is imposed. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707, *review denied*, 152 Wn.2d 1016 (2004). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Neither Lampson nor Rettig can point to an error by the trial court in denying the requested sanctions. Instead, in what is probably an implicit acknowledgement that the trial court's decision is largely unassailable, they point to the fact that summary judgment was granted to each as an indication that the claims were frivolous. They essentially equate "frivolous" to "without merit." Under such reasoning, *every* grant of summary judgment would also require payment of attorney fees under the frivolous litigation standard. However, the statute requires more than that the action was without merit. It must be frivolous and also "advanced without reasonable cause." RCW 4.84.185. A frivolous action is one that presents no debatable issues and is totally devoid of merit. *Lutz Tile*, *Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007), *review denied*, 162 Wn.2d 1009 (2008). While we agree with the trial court that the case was without merit, we are not in a position to say that there were no debatable issues. There also is no basis

for finding that the case was advanced without reasonable cause. The trial court did not err in rejecting the claim for attorney fees under the statute.

Similarly, CR 11 permits sanctions, including attorney fees, when an attorney advances litigation lacking a legal or factual basis without adequate investigation of the legal and factual bases for a case. *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 141, 64 P.3d 691, *review denied*, 150 Wn.2d 1016 (2003). Here, trial counsel relied on historic facts (and his client's view of those facts) in crafting his pleadings. While the complaint lacked merit, we agree with the trial court that it was not inadequately investigated. Accordingly, the court did not err in denying CR 11 sanctions.

Both Lampson and Rettig also seek attorney fees on appeal under the same theories. We exercise our discretion and decline to do so. While Mr. Bayha's appeal was without merit, it was not entirely frivolous. Attorney fees are not in order. *Zink*, 137 Wn. App. at 279.

CONCLUSION

The various judgments of the trial court are affirmed. The Bank is the only substantially prevailing party and is entitled to its costs. RAP 14.1; RAP 14.2.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

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Kulik, J.